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U.S. Citizenship and Immigration Services

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[redacted]

JAN 11 2005

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 03 082 52487

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of Florida in January 1998. It wholesales sunglasses. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established: (1) the beneficiary's managerial or executive capacity for the petitioner; (2) that it or the foreign entity continued to do business; or (3) its ability to pay the beneficiary the proffered wage.

On appeal, the petitioner asserts that it can provide the evidence requested by the director and acknowledges that the information was not included with the petition. The petitioner attaches "evidence of proffered wage in the form of annual and quarterly reports, job titles and function of US employees, and evidence of US and foreign business actions."

The petition was filed January 27, 2003. The AAO observes that the petitioner submitted evidence on appeal of transactions occurring in 1998 and 1999, annual and quarterly reports dated in 1998 and 1999, and a description of the beneficiary's proposed duties for the United States petitioner that had been attached to a previously submitted Form I-129. The petitioner also attaches several untranslated documents.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner established that the beneficiary would be employed in a managerial or executive capacity for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
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> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily
>
> i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On the January 27, 2003 Form I-140, Immigrant Petition for Alien Worker, the petitioner indicated that the beneficiary's position involved "overall administration and supervision of the company's daily activities." The petitioner noted it employed two people.

On October 16, 2003, the director requested that the petitioner submit persuasive documentary evidence that the beneficiary would be employed as a multinational executive or manager. The director asked for additional details regarding the proposed position of the beneficiary, including her daily duties and the percentage of time spent on various duties.

In a January 9, 2004 response, the petitioner noted that the beneficiary was transferred to the United States as an executive pursuant to an L-1A intracompany transferee approval. The petitioner noted further that the beneficiary's "services were considered indispensable for the continuation of the expected growth in [the petitioner's] commercial activities." The petitioner did not provide further detail of the beneficiary's actual daily duties.

The director determined that the record did not establish that the beneficiary would be employed in a managerial or executive capacity but rather would be employed in an operational capacity.

As observed above, the petitioner submits documents relevant to 1998 and 1999 and a general description of the beneficiary's proposed duties for the United States entity on appeal. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Moreover, the AAO notes that the evidence submitted on appeal is neither relevant to nor sufficient for the matter at hand. The description of the beneficiary's duties submitted with the beneficiary's Form I-129 is vague and nonspecific and is not substantiated by the record. Further, if the previous nonimmigrant petitions were approved based on this description and the same unsupported assertions that are contained in the current record, the approval would

constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that Citizenship and Immigration Services (CIS) or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). The petitioner has not shown that the beneficiary would be employed in a qualifying managerial or executive capacity. For this reason, this petition may not be approved.

The second issue in this proceeding is whether the petitioner has maintained the necessary multinational aspect of this visa classification. The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States." The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part: "*Doing Business* means the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

On October 16, 2003, the director requested evidence that both the petitioner and the foreign entity continued to do business. The petitioner did not address this issue in its response to the director. Again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Moreover, as observed above, on appeal the petitioner submitted a 1998 annual report and tax return, 1998 and 1999 quarterly returns, invoices for transactions occurring in 1998 and 1999, and documents that had not been translated. Documents concerning events in 1998 and 1999 are not relevant and do not establish that either the petitioner or the foreign entity continued to do business in 2002 and 2003. Further, the AAO cannot determine whether the information contained in the untranslated documents supports the petitioner's claims. The regulation at 8 C.F.R. § 103.2(b)(3) states: "Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. The petitioner has not shown that the foreign entity has continued to do business. For this additional reason, this petition may not be approved.

The third issue in this proceeding is whether the petitioner has established the ability to pay the beneficiary the proffered wage. The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner has provided no probative evidence establishing its ability to pay the proffered wage. The record does not contain evidence that the petitioner paid the beneficiary the proffered wage in the past and does not contain evidence that the petitioner had the ability to pay the proffered wage in January 2003 when the petition was filed. For this additional reason, this petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.